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No. 82-227

In the Supreme Court of the United States

OCTOBER TERM, 1982

PROVIDENCE JOURNAL COMPANY,
PETITIONER,

v.

HOME PLACEMENT SERVICE, INC., AND
JOSEPH P. MUSCHIANO,
RESPONDENTS.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Statement of the Case

This action was brought under Sections 1 and 2 of the Sherman Anti-Trust Act 15 U.S.C. § 1 and 2.

Respondents, Home Placement Service, Inc. (Home Placement) and its President, Joseph P. Muschiano (Muschiano) began business in the State of Rhode Island in March-April, 1973. Its business was to sell rental information concerning the availability and location of rental property to prospective tenants for a fee. Home Placement provided its service to landlords free of charge.

Home Placement could market its business in the State of Rhode Island only by advertising in the newspapers published by the Petitioner, The Providence Journal Co. (Journal), the only daily newspaper in Rhode Island with substantial statewide circulation. An advertising expert testified that a rental referral business such as Home Placement had to advertise in petitioner's newspapers if it wanted to attract the necessary clientele to be profitable and thus survive competitively. Economists testified to the Journal's complete monopolistic position in the daily newspaper in the State of Rhode Island.

Home Placement's method of doing business competed directly with the Journal's sale of classified advertising because it drained prospective advertising customers (landlords) from the Journal. Thus, if rental referral businesses were denied advertising in the Journal's newspapers, a whole class of the Journal's direct competitors would be eliminated from the marketplace.

This is precisely what happened. On February 1, 1973 the Journal adopted a policy whereby they refused to accept advertising from all rental referral businesses. The Journal claims that the adoption of this policy was motivated by an earlier bad experience with an unrelated rental referral business, Homefinders of America. *See, Homefinders of America, Inc.* v. *Providence Journal Co.*, 621 F.2d 441 (1st Cir. 1980). However, there was no claim of deceptive practice of unethical behavior by any other rental referral business other than Homefinders. Thus, the effect of the Journal's policy was to eliminate not only Homefinders from the marketplace but all other rental referral businesses, including Home Placement.

As a result of its inability to advertise its business, Home Placement had to go out of business. In fact, the Journal's policy effectively wiped out its competition from rental referral firms.

Argument

A. The Decision Below Does Not Conflict With Any Decision Of This Court Or Of Any Other Circuit Court; Is Consistent With Other Sherman Act Anti-Trust Cases And Does Not Impinge Upon Or Violate First Amendment Principles

Petitioner's belated attempt to transform this matter into a First Amendment case entitling them, as a newspaper publishing company, to preferential treatment under the laws of this land is transparent.[1] The truth is simply that this is a Sherman Act anti-trust case entitling them to no such preferential treatment.

Petitioner, a monopoly newspaper in the State of Rhode Island, refused to accept and/or to publish advertisements from all Rental Referral business including respondent herein. These Rental Referral businesses were petitioner's direct competitors because they provided rental services to landlords free of charge and thus drained prospective customers from the petitioner's classified advertising column. The net effect of petitioner's policy and conduct was to eliminate all rental referral firms (petitioner's competitors) from the marketplace because, as testified to by respondent's experts and unrebutted by petitioner, the only effective way to market the rental referral service in the State of Rhode Island was to advertise in the newspapers published by petitioner.

What is in issue here is the defendant's *conduct* in adopting and enforcing a blanket policy of refusing all rental referral advertising without regard to whether the advertising was deceptive and without regard to the ethical business conduct of the advertiser. Contrary to petitioner's assertion, their

[1] Petitioner's entire argument in the Court of Appeals on the First Amendment issue is contained in a single footnote to its brief.

decision to refuse all rental advertising was not *content* related. The petitioner has always accepted and still does accept and publish advertising which describes apartments or houses for rent. Rather, petitioner's decision to refuse to accept advertising from rental referral businesses was based solely on the fact that Rental Referral businesses *charged the prospective tenant a fee* for rental information. Petitioner's stated policy, advertised daily in their newspapers, reads:

> "REAL ESTATE RENTAL
> ADVERTISING POLICY
>
> The Providence Journal Company does not knowingly accept advertising where a fee is required to obtain rental information. Readers are invited to call if they are being required to pay such fees.
>
> Classified Customer Service, 331-2800".

Clearly, petitioner's decision not to publish these advertisements is not *content* related but instead is related to how the advertiser does business.

Newspaper publishing companies occupy no preferred position under the anti-trust laws and may be prohibited by injunction from refusing advertising when said refusal violates the anti-trust laws. *See, Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951). This Court has recognized that there may be cases under the Sherman Act where the granting of relief may impinge on First Amendment freedoms but:

> "The First Amendment does not 'make it . . . impossible ever to enforce laws against agreements in restraint of trade . . .' *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502, 921 L.Ed. 834, 69 S.Ct. 684. In fashioning a remedy, the District Court may, of course, consider the fact that its injunction may impinge upon rights that

> would otherwise be constitutionally protected, but those protections do not prevent it from remedying the antitrust violations".
>
> *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 690-692

No affirmative relief has yet been granted in this case. However, it is clear that the First Amendment would not prohibit a Court from enjoining the anti-competitive conduct of petitioners in this case.

The Tornillo[3] line of cases are simply inapposite because they are *access* cases not anti-trust cases. In the access cases a person or entity is affirmatively seeking access to the newspaper for publication purposes, but there is no illegality on the part of the newspaper publishing company which has to be remedied. Here the defendants conduct has been deemed to be in violation of the anti-trust laws and the Court is simply remedying the violation by enjoining the violative conduct. This Court has clearly sanctioned this course in this and other contexts. *See, Lorain Journal* v. *United States, supra; Pittsburgh Press Co.* v. *Human Relations Comm.*, 413 U.S. 366, 390 (1973).

Contrary to petitioner's assertion the decision by the Court of Appeals was a reasoned application of the Sherman Act to the facts of this case. Based upon the unrebutted and uncontradicted testimony presented by respondents, the Court of Appeals concluded that the effect of petitioner's Rental Referral Policy was to eliminate petitioner's direct competitors from the marketplace in violation of both Sections 1 and 2 of the Sherman Act. The Court of Appeals did not "straight jacket" petitioner into accepting advertising from all Rental Referral businesses. In fact, in an earlier case, the same Court refused to impose anti-trust liability on petitioner where the record

[3] *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974).

evidence was found to support a conclusion that the plaintiff in that case had engaged in deceptive practices. *See, Homefinders of America, Inc.* v. *Providence Journal Co.*, 621 F.2d 441 (1st Cir. 1980).[3]

The decision of the Court of Appeals is entirely consistent with many decisions of this Court which hold that conduct which causes an anti-competitive effect on the marketplace violates the Sherman Act regardless of whether said conduct is motivated by an anti-competitive intent.[4] *See, United States* v. *U.S. Gypsum Co.*, 438 U.S. 422 at note 13; *McLain* v. *Real Estate Board of New Orleans*, 444 U.S. 232, 242 (1980) (civil anti-trust claim proven by showing *either* anti-competitive effect or intent). *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 690-692 (test of illegality is the effect of defendants conduct on competitive conditions); *United States* v. *Griffith*, 334 U.S. 100, 106 (1948) (unlawful use of monopoly power in violation of Section 2 found without regard to anti-competitive animus). As the Court of Appeals below noted:

> "It makes no difference that defendant's motives may be claimed to have been pure. Specific intent is necessary only when an attempt to monopolize is alleged. *See, Times-Picayune Pub. Co.* v. *United States*, 153, 345 U.S. 594, 626. Lack of bad purpose is irrelevant where the defendant already possesses monopoly power and, without justification, uses it to exclude competition. *United States* v. *Griffith*, 1948 334 U.S. 100, 105. *Byars* v. *Bluff City News Co.*, 6 Cir., 1979, 609 F.2d 843. We

[3] Senior Judge Baily Aldrich wrote both the Homefinders and Home Placement decisions for the First Circuit.

[4] Petitioner's statement that there was only "hypothetical . . . competition . . ." and no showing of anti-competitive effect, *Petition for Certiorari at 21*, is quite remarkable in light of the Court of Appeals recitation of some of the undisputed facts concerning same. See, A. 6-7.

> agree with the court in *Byars* that 'what should matter is not the monopolist's state of mind, but the overall impact of the monopolist's practices'. Id. at 680. When the foreseeable and proximate consequence of defendant's conduct was unreasonably to perpetuate an already existing monopoly by excluding a potential competitor, it would be of no solace to plaintiff, or the consumers the anti-trust laws were designed to protect, that the defendant may not have been seeking this result."
>
> A.12

The Sherman Act protects "competition". *See, Brunswick Corp.* v. *Pueblo Bowl-O-Matic, Inc.*, 429 U.S. 477 (1977). Under petitioner's view destruction of competition would be permitted under the Sherman Act so long as it was done in "good faith". Here, petitioner did not demonstrate a necessity for such anti-competitive conduct and thus no justification existed for conduct which eliminated an entire class of competitors from the marketplace. *Cf. Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973).

The only circuit case to which petitioner points for conflict is *Mid-Texas Communications Systems, Inc.* v. *American Tel & Tel*, 615 F.2d 1372 (5th Cir.) *cert. denied* 449 U.S. 912 (1980).[5] Petitioner argues that the Fifth Circuit decision conflicts with the decision that the First Circuit in this case because the First Circuit:

> "...simply brushed aside the Journal's good faith 'articulable concerns' about its readers and about its journalistic integrity..."
>
> *Petition for Certiorari at* 23.

[5] The other case cited by petitioner *at* 23 supports respondent's position.

Regardless of the correctness of the *Mid-Texas Communications Systems* decision by the Fifth Circuit, it does not conflict with the decision of the First Circuit in this case. The First Circuit did not "brush aside" petitioner's proffered business justification. Rather, accepting the business justification as proffered, the Court deemed said justification inadequate *as a matter of law*. Thus, the First Circuit gave full consideration to all the undisputed facts concerning the proffered business justification and found said justification inadequate in the face of an anti-competitive policy which eliminated a whole class of petitioners competitors from the marketplace. There is no conflict with the Fifth Circuit's decision in *Mid-Texas Communication* because all of the undisputed facts concerning the proffered justification were considered by both the trier of fact and the Court of Appeals in this case—precisely what the Fifth Circuit said should have been done in *Mid-Texas Communications*. That Court of Appeals in this case reached a different legal conclusion than did the District Court on the undisputed facts is not unusual.

Finally, the decision below does not restrict the right of a state to regulate the activities of Rental Referral businesses. The cases relied on by Petitioner[6] represent *state* activity to regulate advertising practices in the professions or to regulate rental referral agencies. States have traditionally regulated advertising practices of real estate businesses and professions, but that does not mean that a private entity, petitioner herein, has that same power and authority to regulate and/or eliminate rental referral businesses from the marketplace in violation of the Sherman Act.

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[6] *See, Petition for Certiorari at* 24-26 and note 11. Moreover contrary to petitioner's assertion that rental advertising is inherently deceptive, the Federal Trade Commission did investigate the rental referral business, and although it did impose restructions, it did not find the rental referral practice inherently deceptive. *See, In the matter of Rentex, Inc.*, T/A Homefinders, 1976 87 F.T.C. 1304.

B. The Decision Below Does Not Depart From Established Standards Of Appellate Review But Rather Is Entirely Consistent With Those Standards

Petitioner argues that the Court of Appeals' decision is in violation of Rule 52 FRCP and conflicts with this Court's decision in *Pullman Standard* v. *Swint*, ____ U.S. ____ 102 S.Ct. 1781 (1982). Nothing could be further from the truth.

In *Swint* this Court held that a district court's findings of fact on *discriminatory intent* could not be set aside unless clearly erroneous as required by Rule 52 FRCP. The *Swint* decision is not contrary to the decision below because the Court of Appeals did not set aside any findings by the district court concerning the petitioner's anti-competitive intent. Rather the Court of Appeals concluded from undisputed and uncontradicted historical facts that petitioner's conduct had an anti-competitive effect on the marketplace and thus was unlawful.[7] This Court recognized this anti-trust approach in *Swint* by citing to Justice Black's dissent in *United States* v. *Yellow Cab*, 338 U.S. 338 (1945):

> "Relying on *United States* v. *Griffith*, 334 U.S. 100, (1948) [Justice Black] argued that it is not always necessary to prove 'specific intent' to restrain trade; it is enough if a restraint is the result or consequence of a defendant's conduct or business arrangements. Such an approach, however, is specifically precluded by § 703(h) in Title VII cases challenging seniority systems".
>
> *Pullman Standard* v. *Swint, supra* at ____.

[7] The Court of Appeals did set aside as clearly erroneous the district court's findings that Homefinders business and advertising practices were indistinguishable from Home Placement's business and advertising practices. A.2. Thus, the business justification for the refusal the Court found in Homefinders was not present in Home Placement.

Thus, there was no issue of intent for the Court of Appeals to resolve because of the anti-competitive effect of petitioner's conduct. Moreover, the Court of Appeals decision to decide legal issues not reached by the District Court was proper because the historical facts concerning the merits of the anti-trust violation were undisputed. In fact, respondent's testimony and evidence on the anti-trust issues was unrebutted and uncontradicted. Petitioner presented no witnesses, expert or otherwise, on the anti-trust issues but rather relied solely on evidence of customer complaints of bad business practices and deceptive advertising of Homefinders (an unrelated business enterprise) but not of Home Placement.

Thus, the Court of Appeals approach in this case was to apply a proper legal analysis to undisputed historical facts, an approach entirely consistent with both Rule 52 FRCP and this Court's decision in *Pullman Standard* v. *Swint, supra.*

Conclusion

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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